No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1939

LAWRENCE YEARSLEY AND GEORGE YEARSLEY, PETITIONERS

v.

W. A. ROSS CONSTRUCTION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AMICUS CURIAE

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OPINION BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 180) is reported in 103 F. (2d) 589.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 10, 1939 (R. 186). A petition for rehearing was denied on June 2, 1939 (R. 188). The petition for a writ of certiorari was filed on June 29, 1939, and granted on October 9, 1939. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether landowners, whose land is washed away as a result of navigation works constructed by a contractor for the United States and in accordance with its directions, can maintain an action against the contractor, or are limited to a suit for just compensation against the United States under the Tucker Act.

2. Whether, when the United States, for the improvement of navigation, stabilizes the course of a theretofore constantly shifting river by means of dykes and revetments, and the river in its new course occupies and washes away land which it had within a few preceding years built up by accretion, such land is taken by the United States within the meaning of the Fifth Amendment.

STATEMENT

This action was brought by petitioners in a Nebraska state court and was removed by respondent to the United States District Court for Nebraska (R. 6-9).

The amended petition, filed December 23, 1937, alleges, among other things, that petitioners own an undivided two-thirds interest in certain lands; that one Stephenson who owns the remaining undivided one-third interest has refused to join in the action and is therefore made a party defendant; that during the last three years respondent, Ross Construction Company, has been engaged in construction work on the Missouri River, changing its course, and during that time "has built dykes in said river and used large boats with paddles and pumps to produce artificial erosion to wash away land along said Missouri river banks and in so

doing has washed and taken from plaintiffs' said farm" 140 acres of pasture land of a value of $50 and $75 an acre (R. 10–11). Petitioners prayed that they recover "damages" for this in the amount of $6,000 (R. 11).

The answer to the amended petition denies that respondent has by its construction work washed away the land in question or produced artificial erosion or changed the course of the river, except to confine it between stabilized bank lines as fixed by Government engineers in charge of the construction work for the United States (R. 12). It further alleges that the Act of January 21, 1927, c. 47, 44 Stat. 1010, 1013, adopted and authorized to be prosecuted, under the direction of the Secretary of War and the supervision of the Chief of Engineers, the project set out in House Document No. 1120, 60th Congress, 2d session, for securing a permanent navigable channel between Kansas City and Sioux City, Iowa; that respondent entered into two contracts, dated September 13, 1933, and July 11, 1935, respectively, with the United States for the construction of part of the work thus authorized; that these contracts prescribed the specifications for the work and the place where each item of construction work was to be located and the method of doing the work; and that all of the work done by respondent in the proximity of petitioners' lands was done pursuant to and in strict accordance with the contracts with the United States and as an agent of the United States and under the supervision of the Chief of Engineers (R. 12–14).

Petitioners filed a reply admitting that respondent is operating under a contract with the United States

as alleged in the answer, but alleging that the contract does not contemplate the taking of petitioners' property without just compensation and without due process of law, and that the acts of respondent in destroying petitioners' land infringes their constitutional rights under the Fifth Amendment (R. 22).

On these pleadings the case was tried before a jury, during May 1938. While there is some conflict in the evidence, the facts which are thought to be determinative of the case are virtually undisputed. They are:

Petitioners and Stephenson jointly owned land situated on the Nebraska or west bank of the Missouri River (R. 41.)[1] They acquired the land by purchase at a referee's sale in 1928 (R. 41). Before that petitioner's father had owned it; he had bought it in 1912 (R. 41).

The Act of January 21, 1927, c. 47, 44 Stat. 1010, 1013, authorized the prosecution of a project for securing a permanently navigable channel in the Missouri River between Kansas City and Sioux City, Iowa.[2]

Respondent entered into two contracts, dated respectively September 13, 1933, and July 11, 1935, to do part

[1] Petitioners sold the land in question, either during or shortly before the trial, to one Jessen, reserving, however, the right to prosecute this action (R. 23, 41, 157).

[2] The Act of January 21, 1927, authorized the work in accordance with the report of the Board of Engineers for Rivers and Harbors submitted in House Document 1120, 60th Congress, 2d Sess. The Act of August 30, 1935, c. 831, 49 Stat. 1028, 1034, authorized further prosecution of the same project, describing it as the project recommended in House Document 238, 73d Congress.

of the construction work on this project (R. 69–87).[2] The construction program in the general vicinity of petitioners' lands is indicated on Defendant's Exhibit 7 (R. 113). The Yearsley deeded land is the small square in the center of the map indicated by the letters A, E, F, and G (R. 115). The construction works particularly involved in this case are two dykes constructed by respondent on the east or Iowa side of the River. These dykes are indicated on Exhibit 7 as dyke 602.7 and its trailer dyke 602.7A north of the Yearsley land and across the river, and dyke 601.9 and its trailer dyke 601.9A across the river directly opposite the Yearsley land (R. 98). These dykes are also shown on Exhibits 12 (R. 93) and 23 (R. 107), except that trailer dyke 601.9A does not appear on Exhibit 12.

As indicated on these exhibits, the federal project for stabilizing and confining the channel of the Missouri River involved moving the channel of the river to the west in the vicinity of the Yearsley land, with consequent washing away of some of the Yearsley land. As also there indicated, and as shown in the second contract between the Government and respondent (R. 89), when the land has been washed away up to a point predetermined by the Government, revetments will be built on the bank above and along the Yearsley land to pre-

[2] Both contracts provide that the contractor shall be responsible for all damages to property resulting from its negligence in connection with the prosecution of the work (R. 74–75, 87). The first contract, at least, further provides (R. 84–85): "The United States will not secure nor lease land necessary for the contractor's use, nor be responsible for trespassing upon or injury to private lands or other property by the contractor or his employees."

vent any further washing. This revetment is indicated on Exhibits 7, 12, and 23 as 602.3 but it had not been built at the time of trial because the land had not yet been eroded up to the intended line of the revetment (R. 110).[4]

Dykes 602.7, 602.7A, 601.9, and 601.9A were constructed by respondent, beginning in 1934, as envisaged by the project and the contracts (R. 95, 98–108). The construction work was in accordance with detailed specifications in the contracts with the Government, and was done under the direct and constant supervision and direction of Government inspectors (R. 98–108, 117–123, 125–127, 138–144).

These dykes directed the current of the river against the banks where petitioners' land lay, and, as they were intended to do, caused part of petitioners' land to be washed away (R. 42–43, 110–111, 124, 128–129). Some of the witnesses testified that the erosion was in part caused by deliberate washing by the paddles of boats of respondent (R. 42–43, 45, 51–52). In any event, part of the Yearsley land was washed away by respondent, whether wholly by the dykes or in part by boat paddle washing, and it was intended to be washed away as a necessary part of the federal project for the stabilization of the river (R. 124).

The land which was washed away was part of the tract which is described throughout the record as the Yearsley "accretion" land as distinguished from the Yearsley "deeded land" (R. 41–43). Comparison of Plaintiff's Exhibit 1 (R. 47) with Defendant's Exhibit

[4] We are informally advised by the War Department that this revetment was completed in August and September 1939.

2 (R. 57), both prepared by the county surveyor, and examination of the explanations thereof (R. 49, 56), show that all of the land which was washed away had been built up by accretion since 1923. Defendant's Exhibit 5 (R. 65) shows that part of the 1923 Yearsley land had been built up since 1917, and that by 1928 a great deal more had been built up. In 1912 all of the "accreted" land was in the river and part of the "deeded" land (R. 67).

At the close of the evidence, respondent made motions for a directed verdict on the grounds, among others, that its actions upon which liability was predicated were done as agent for the United States; that if any property had been taken within the meaning of the Constitution, petitioners' redress was in the Court of Claims, and that the damage to petitioners' land was consequential damage due to navigation works for which neither respondent nor the United States was liable. (R. 162–163). These motions were denied (R. 164).

The instructions under which the district court submitted the case to the jury (R. 166–174) were in substance that the petitioners might recover if the jury found that their land was washed away as the direct result of the building by the respondent of the two dykes or of the washing done by respondent's boats. The court specifically instructed the jury that it would not be a defense to the action that the respondent had done the construction work in accordance with contracts with the United States and with the approval and in accordance with the orders of Government offi-

cers in charge (R. 170). Respondent excepted (R. 174) to this portion of the charge, as it had to the court's refusal to charge that such matters would be a defense (R. 164–165).

The jury returned a verdict in favor of petitioners in the amount of $806.00 (R. 177) and the court entered judgment accordingly (R. 177).

On appeal, the Circuit Court of Appeals for the Eighth Circuit reversed (R. 186). It held that petitioners were entitled to maintain the action against respondent alone, even though all the work done by respondent was authorized and directed by the Government, but that the building of the dykes which caused the erosion of the petitioners' land did not constitute a taking of property for which compensation must be made, but was merely a consequential injury incident to a public undertaking (R. 181–186).

STATEMENT OF THE INTEREST OF THE UNITED STATES

The United States has a considerable interest in the disposition of each question presented by this case.

1. Orderly procedure would indicate that a suit for land alleged to be taken by the United States should be brought against the Government, not its agent. The ultimate payment will be met by the Government in any event. In the particular case of recovery against a contractor, Congress would be likely to appropriate for his reimbursement. In addition, the possibility of being held liable for a taking of land would tend to induce contractors to increase their bids to a point which would cover this speculative but large expense, unless a satisfactory provision for reimbursement of

the contractor were included. See, generally, *Richmond Co.* v. *United States*, 275 U. S. 331, 342–343. From any view, the ultimate cost to the Government would be likely to exceed that incurred if it alone were liable to make just compensation for property taken at its direction. And, as a general proposition, it seems plain the Government should control the litigation which will fix its liability.

At least one, and perhaps both, of the contracts involved in this case provides that the Government will not "be responsible for trespassing upon or injury to private lands or other property by the contractor" (R. 84–85; see R. 86, 87). It would be arguable that this provides that the contractor must pay any claim for just compensation, and that petitioners as third party beneficiaries could bring suit on this clause. We do not believe the provision fairly imports so exceptional an undertaking. If it does, we have no interest in the disposition of this particular case, but retain the full measure of our interest in the general question.

2. It is unnecessary to develop the evident interest of the Government in petitioners' case on the merits. The cost of the extensive programs of channel improvement and bank stabilization would very largely be increased if this Court were to hold that the consequent changes in the course of the river amounted to a taking of the eroded land.

SUMMARY OF ARGUMENT

Respondent, as agent for the United States, constructed dykes which caused land of petitioners to be washed away. The construction work was done in ac-

cordance with the instructions of the United States, and was a part of a federal project for the improvement of navigation on the river. Petitioners contend that their property has been "taken" for a public use within the meaning of the Fifth Amendment, and they seek to recover just compensation therefor from respondent.

I

No action can be maintained against respondent for the washing away of the land, petitioners' remedy, if any, being a suit against the United States under the Tucker Act.

A. Respondent's construction work was admittedly authorized by Congress. If, as petitioners claim, it resulted in a taking of their land within the meaning of the Fifth Amendment, the taking was an exercise of its eminent domain power by the Government, and petitioners have a remedy by suit against the United States under the Tucker Act to recover just compensation. *United States* v. *Lynah*, 188 U. S. 445. The Government had power to take petitioners' land by eminent domain in aid of its navigation project. While the Fifth Amendment requires that just compensation be paid for property taken it does not require payment in advance of the taking, and the right to sue the United States under the Tucker Act is a sufficient provision for compensation. *Hurley* v. *Kincaid*, 285 U. S. 95; *Crozier* v. *Krupp*, 224 U. S. 290. If petitioners' land was taken it was by a valid exercise of the power of eminent domain and not by an illegal act of the respondent, and petitioners have an adequate remedy against the United States.

B. An agent of the Government is not personally accountable for acts validly authorized by the latter. *The Paquete Habana*, 189 U. S. 453, 465; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 283. The decisions, such as *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620, and *Scranton* v. *Wheeler*, 179 U. S. 141, 152, in which this Court has held that a suit could be maintained against an agent or officer purporting to act for the Government, all had reference to suits based on illegal acts of the agent or officer, that is, acts which either were not authorized by the Government or the authorization for which was unconstitutional. Here the acts were authorized and, since the Government had provided an adequate remedy against itself if there was a taking, the authorization was constitutional.

The decisions of this Court dealing with the taking of private property by an agent or officer of the Government have not squarely passed on the question here presented. Nevertheless there is clearly implicit in those decisions, and in the related decisions dealing with the use of patents by federal agents, the doctrine that no action can be maintained against the agent if he acted under a constitutional authorization from the Government; that is, if the Government provided a remedy against itself. See *United States* v. *Lynah*, 188 U. S. 445, 465–466; *Crozier* v. *Krupp*, 224 U. S. 290, 305–307. Numerous state courts, passing squarely on the question here in issue, have held that no action can be maintained against the officer or agent and that the only remedy is against the government. No decision to the contrary has been found.

The proposition is clear on principle. Viewing it one way, the provision of a remedy against the United States by legalizing the acts of the agent eliminates any basis for any known common law action against the agent. See 2 Nichols, *Eminent Domain* (2d ed.); § 468, pp. 1237–1238. Viewing it another way, it may be said that Congress intended the remedy against the United States to be exclusive. Congress clearly had power to make the remedy exclusive, *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, and it should be presumed to have so intended since that would be to the advantage of the United States, yet would not impose hardship on complaining property owners. Numerous state decisions adopt this approach.

II

Petitioners' lands have not been taken within the Fifth Amendment; rather petitioners have suffered consequential injury which where incident to public improvements, as here, is not actionable. This Court has announced many, and not always consistent, criteria for determining whether there has been a taking of property for which compensation must be paid under the Fifth Amendment or a consequential injury incident to a public project. Viewed, however, from the standpoint of the nature of the Government's project the cases uniformly hold that land permanently subjected to overflow by backwater from dams is taken within the meaning of the Fifth Amendment, but that land damaged by reason of alteration of the natural direction, velocity, or volume of a stream by dykes, revetments, or levees is not so taken. *Bedford* v.

and *United States* v. *Archer*, 241 U. S. 119, dealing with washing caused by a dyke, were decided upon facts especially analogous to those in the present case.

This distinction between the flooding of land by backwater from dams and the washing away of land by dykes or revetments is not only the only discernible reconciliation of the decisions of the Court but is expressive of important considerations of policy and justice. The location and extent of land which will be flooded by backwater from a dam can readily be ascertained in advance of construction, and payment of compensation for such land imposes upon the Government no burden unusual in character or unlimited in extent. There is, on the other hand, virtually no limit as to the location or extent of land for which compensation could be claimed if the Government is liable for all damage which can be traced to its dykes or revetments. This consideration was given great weight by the Court in the *Bedford* case (192 U. S. at 224). The effects which will result from changing the course or direction of moving waters are virtually impossible of ascertainment in advance. Soil peculiarities, floods, accidental lodging of obstructions—all modify or obscure the result of the construction work. Even after the construction has been completed and damage has resulted it will often be virtually impossible to determine whether the damage resulted from the Government's work, or whether it would have resulted from other independent causes even if that work had not been undertaken. In *United States* v. *Archer*, 241 U. S. 119, 131–132, the Court was unwilling to hold the Government liable for

the reason, among others, that it was not satisfied but that the river would eventually have effected the damage complained of even if the Government had not constructed the dyke. Lands along a shifting river are, in other words, by reason of their location subject to a "natural servitude."

The doctrine is peculiarly applicable to the valley of the Missouri River. That river is notorious for the great and kaleidoscopic changes in its course. Through the lower part of its course the river flows between high bluffs a few miles apart and all of the land in the valley has at one time or another been part of the river bed. The record in this case shows that the very land for which compensation is here sought was built up in the river bed between 1923 and 1934 when the construction work was commenced. It further shows that during the middle part of the nineteenth century not only that land but practically all of petitioners' land was the bed of the river.

The Government project had been in contemplation long before construction was actually started and if the Government had begun its work earlier, before the land for which petitioners seek compensation had been built up, there could be no claim against it. We submit that the Constitution does not require that the Government, in order to escape liability for a taking of accretion land, commence its construction work at the precise moment that the river occupies the location in which the Government desires to fix it. It is reasonably clear, moreover, that petitioners' benefit from the Government project, fixing the banks of the river, will exceed their damage.

ARGUMENT

Petitioners admit here (Br. 2–3), and they have admitted throughout this litigation, that the construction work done by respondent which resulted in the washing away of petitioners' land was done under authority of the United States as part of a public work undertaken by the latter for the improvement of navigation. The public project was authorized by Congress, and the work done by respondent was pursuant to contracts with the United States, and was done under the supervision and with the approval of government inspectors. There is no suggestion that respondent was negligent or acted other than in accordance with its contracts in the performance of the work.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. It is, on the other hand, well established that the Government is not liable for consequential injuries resulting from public undertakings; that there is, in other words, a class of injuries which are not actionable if they ensue from public works even though they might and often would be actionable if they were brought about by private activity. Petitioners tacitly concede here, as below, that respondent is entitled to the protection of the rule that there is no liability for consequential injuries caused by public projects,[5] and in

[5] This Court has explicitly recognized that the exemption of the Government from liability for consequential injury resulting from public works extends to agents of the Government. *Scranton* v. *Wheeler*, 179 U. S. 141, 165; *Transportation Co.* v. *Chicago*, 99 U. S. 635, 641–642. Since the Government can act only through agents the exemption would of course be meaningless

their brief argue only that their injuries are not in that category but amount to a "taking" of their property within the meaning of the Fifth Amendment, as construed by the decisions of this Court. Respondent's brief is devoted to answering this contention, as is the second part of this argument.

But before that question is reached there is the question whether this suit can in any event be maintained against respondent. It is the position of the Government that it cannot be so maintained; that, even assuming *arguendo* that respondent's construction work resulted in a taking of petitioners' land within the meaning of the Fifth Amendment, there is no remedy against respondent to recover the just compensation prescribed by the Amendment, but only a remedy against the United States under the Tucker Act.

I

THIS SUIT CANNOT BE MAINTAINED AGAINST RESPONDENT, SINCE PETITIONER'S REMEDY, IF ANY, IS A SUIT AGAINST THE UNITED STATES UNDER THE TUCKER ACT

Petitioners can recover only if their land has been taken within the meaning of the Fifth Amendment. We urge that, even if their land has been so taken, the taking was authorized by the Government and the authorization was valid; and that petitioners, therefore, cannot maintain this action against respondent. Their remedy, if any, is a suit against the United States under the Tucker Act. It is conceded that re-

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unless it did extend to agents. See *Chattanooga & T. R. Power Co.* v. *Lawson*, 139 Tenn. 354, 370-372.

spondent's construction work was authorized by the Government, and the cases establish beyond dispute that the Government had power under the Constitution to authorize the work even if it resulted in a taking, since the Government had provided an adequate remedy against itself by suit under the Tucker Act if there was a taking. The court below, however, held that the suit could be maintained against respondent, upon the assumption that if there was a taking the authorization for it was not valid (R. 183). Consequently, that court did not consider whether this action could be maintained against respondent if respondent's construction work, even if it resulted in a taking, was validly authorized.

A. THE AUTHORIZATION FOR RESPONDENT'S CONSTRUCTION WORK WAS VALID, WHETHER OR NOT THE WORK RESULTED IN A TAKING

The court below recognized, as was not disputed, that the construction work done by respondent was authorized and directed by the United States for the purpose of improving navigation (R. 182). The court below held, however, that even though respondent acted under the authority and direction of the United States this action could be maintained against respondent to determine the validity—that is, the constitutionality—of that authority, and it assumed that if what respondent had done amounted to or resulted in a taking, the authority for it was invalid (R. 182–183). Accordingly it addressed itself to the question whether there was a taking.

This assumption that if there was a taking the authorization for it was invalid is wholly unwarranted and is contrary to a long line of decisions of this Court. The Government had power to take petitioners' land by eminent domain in aid of its project to improve navigation. While the Fifth Amendment requires that just compensation be paid for property taken by the Government, it does not make payment in advance of the taking a prerequisite to the validity of the taking but requires only that payment of just compensation be adequately secured. *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *Crozier* v. *Krupp*, 224 U. S. 290, 306; see also *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 678–679; *Hays* v. *Port of Seattle*, 251 U. S. 233; *Bragg* v. *Weaver*, 251 U. S. 57, 62; *Williams* v. *Parker*, 188 U. S. 491, 502–503; *Adirondack R. Co.* v. *New York*, 176 U. S. 335, 349–350; *Sweet* v. *Rechel*, 159 U. S. 380, 404; *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568–569. A right to sue the United States under the Tucker Act is sufficient provision for just compensation. *Hurley* v. *Kincaid*, 285 U. S. 95; *Crozier* v. *Krupp*, 224 U. S. 290. And, if there was a taking here, petitioners have an action under the Tucker Act to secure just compensation. *United States* v. *Lynah*, 188 U. S. 445, 465, is explicit that where a taking results from authorized acts of agents of the Government, it is not to be considered the illegal act of the agents but an exercise of eminent domain by the Government, for which just compensation can be recovered under the Tucker Act. Compare *Crozier* v. *Krupp*, 224 U. S. 290; *Hurley* v. *Kincaid*, 285 U. S. 95.

The assumption of the court below, that if there was a taking the authorization for it could not be valid, overlooked the remedy unquestionably available to petitioners under the Tucker Act. And the cases cited by the court below upon this point (R. 183) hold, as they are cited to hold, only that the authority of an agent of the Government, or the validity of the authority, may be inquired into in a suit against the agent.* Here there is no real question of authority, or of the validity of the authority. The question raised by petitioners is whether there has been a taking within the Fifth Amendment for which the United States must pay just compensation, for which it could be sued under the Tucker Act.

B. RESPONDENT IS NOT PERSONALLY ACCOUNTABLE FOR ACTS WITHIN AUTHORITY LAWFULLY CONFERRED UPON IT BY THE GOVERNMENT

Since the respondent's acts were thus lawful, and done under the authority of and as agent for the Government, it is submitted that respondent cannot be held personally accountable for any taking of petitioners' land which resulted, and that this action cannot be maintained against it.

1. *The general rule.*—It has several times been held or stated by this Court that an agent of the Government

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*In one of the cases cited below, *Scranton* v. *Wheeler*, 179 U. S. 141, 152, this Court decided in a suit against an agent whether a taking had occurred, upon the assumption that if there was a taking the authorization of the agent was invalid. That decision, like that below in the present case, took no account of the remedy under the Tucker Act, the existence of which was not fully established until subsequently in *Lynah* v. *United States*, 188 U. S. 445. *Scranton* v. *Wheeler* is fully discussed, *infra*, pp. 22–25.

cannot be held accountable for actions lawfully authorized or ratified by the Government. In *The Paquete Habana*, 189 U. S. 453, 465, the Court, speaking through Mr. Justice Holmes, said:

> But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued.

In that case the Navy had captured ships not liable to capture under international law. The Court held that since the United States had adopted the acts of capture the captors could not be held accountable for damages.

The Court used similar language in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, with reference to the seizure on behalf of the Government of property pursuant to a summary process of distress. It there said (p. 283):

> a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.

To the same effect, see *Lamar* v. *Browne*, 92 U. S. 187, 199; *Wiggins* v. *United States*, 3 Ct. Cls. 412, 423; *Baron* v. *Denman*, 2 Exch. Rep. 167, 187, 189. Cf. *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45.

That a Government agent acting under authority validly conferred by the Government cannot be subjected to suit on account thereof seems obvious as a

matter of principle; the paucity of cases directly so holding appears to be attributable to the clarity of the proposition and to the limited number of situations which could give rise to such cases. But while the direct authority, at least in this Court, seems to be limited, there is abundant indirect authority supporting the principle here contended for. No case has been found which has held or even suggested that agents or officers of the United States are personally liable for action constitutionally authorized by the Government. On the other hand, in every case, so far as has been found, in which this Court has held that a suit could be maintained against an agent or officer purporting to act for the Government the Court has had reference to a suit based on illegal acts; that is, acts either not authorized by the Government or unconstitutionally authorized. See e. g., *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620, and cases there cited. This is true both of suits at law to recover damages or possession of property and of suits seeking injunctive relief.[1] In all such suits the controversy is as to the legality of the agent's conduct, and it is assumed that if the conduct is found to be legal the action cannot succeed.

2. *Decisions of this Court in eminent domain cases.*— While the decisions of this Court dealing with the taking of private property by an agent or officer of the United States do not squarely hold that no action can be

[1] In *Philadelphia* v. *Stimson*, 223 U. S. 605, 619–620, suits at law and at equity are assimilated as respects the right to maintain them against agents or officers purporting to act for the Government.

maintained against the agent if he acted under a constitutional authorization from the Government, that doctrine is plainly implicit in several of the cases and is rejected in none.

United States v. *Lynah*, 188 U. S. 445, is the leading case holding that an action may be maintained against the United States under the Tucker Act to recover compensation for a taking of property resulting from authorized acts of agents of the United States. In that case the Government, through its agents, had constructed dams which caused the plaintiff's land to be permanently flooded. In the course of its opinion the Court said (188 U. S. at 465–466):

> The action which was taken, resulting in the overflow and injury to these plaintiffs, is not to be regarded as the personal act of the officers but as the act of the government. That which the officers did is admitted by the answer to have been done by authority of the government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government.[*]

Scranton v. *Wheeler*, 179 U. S. 141, was decided three years before the *Lynah* case. There the landowner contended that the construction of a pier in a

[*] The court subsequently states that upon the recovery of compensation title in fee to the land flooded will vest in the Government (188 U. S. at 470–471). If the present suit is maintainable to recover compensation for a lawful taking, respondent, if petitioners succeed, would seem to become the owner of part of the bed of the river—a manifest absurdity.

river in front of his riparian land resulted in a taking within the meaning of the Fifth Amendment. He brought suit in ejectment in a state court against a federal employee who was in charge of the pier. The remedy sought, however, was apparently recovery of compensation rather than possession or removal of the pier (see 179 U. S. at 144). This Court held that the suit was not barred as one against the United States. It said (179 U. S. at 152):

> If the plaintiff was entitled to access from his land to navigable water, and if the defendant stood in the way of his enjoying that right, then the court was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him.[9]

Scranton v. *Wheeler* plainly does not support a contention that respondent can be held personally liable in this case; by inference it suggests that the only remedy is against the United States. The holding that the suit was not barred as one against the United States was rested upon the ground that it was the duty of the Court to inquire into "whether the defendant had or

[9] As authority on this proposition the Court cited only *Tindal* v. *Wesley*, 167 U. S. 204, which holds that ejectment can be maintained against state officers or agents unlawfully in possession of real property.

could have any authority in law to do what he had done," and the Court assumed that if what he had done amounted to a taking any authorization for it was unconstitutional. And the opinion shows clearly that the basis of this assumption was that compensation had not been made or secured to the owner by Congress as required by the Fifth Amendment if there had been a taking. See 179 U. S. at 153. The Court, in other words, took no account of the possible remedy against the United States under the Tucker Act, and it followed that if there was a taking it was illegal, since there was no provision for compensation.[10] While the Tucker Act had been on the books since 1887, and *Scranton* v. *Wheeler* was not decided until 1900, the existence of a remedy under the Tucker Act for a taking resulting from authorized acts of agents of the Government was not clearly established until the decision

[10] *Scranton* v. *Wheeler*, has been cited upon the right to maintain suit against an officer or agent only in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620, in opinions embodying a quotation from *Philadelphia Co.* v. *Stimson*, containing the citation of *Scranton* v. *Wheeler* (*Goltra* v. *Weeks*, 271 U. S. 536, 545; *Franklin Tp. in Somerset County, N. J.* v. *Tugwell*, 85 F. 2d 208, 212 (App. D. C.); *M'Creery Engineering Co.* v. *Massachusetts Fan Co.*, 195 Fed. 498, 507 (C. C. A. 1st); *Appalachian Electric Power Co.* v. *Smith*, 4 F. Supp. 6, 13 (W. D. Va.)); and in the opinion below in the present case. In every instance it has been cited for the right to hold an officer or agent accountable for unauthorized action or action under an unconstitutional authorization. *Scranton* v. *Wheeler* was not cited in the elaborate discussion in the *Lynah* case upon the jurisdictional point, where the right to recover for a lawful taking was involved, though it was cited upon the question whether there was a taking.

in the *Lynah* case some three years after *Scranton* v. *Wheeler*.[11]

In *Hurley* v. *Kincaid*, 285 U. S. 95, the Court held that landowners whose land is taken within the meaning of the Fifth Amendment by federal officers or agents acting under valid authorization from the Government cannot enjoin the taking of or interference with their land since they have an adequate remedy at law by suit against the United States under the Tucker Act. It seems clear that the principle of the case goes farther than the narrow holding that the remedy against the Government at law under the Tucker Act eliminates the basis for equity jurisdiction; the Kincaid decision indicates that, in view of that remedy, there is no basis for a suit against the officer or agent at all, whether in law or equity. For if the remedy under the Tucker Act were effective only to bar equity jurisdiction, a suit in ejectment could be maintained against the officers or agents in charge for the Government. *Scranton* v. *Wheeler*, 179 U. S. 141; *Tindal* v.

[11] In *Gibson* v. *United States*, 166 U. S. 269, a suit had been brought under the Tucker Act on facts very similar to those in *Scranton* v. *Wheeler*. The Court of Claims had held that it had no jurisdiction, although it went on to hold also that there was no taking. 29 C. Cls. 18. The Supreme Court, without discussing the jurisdictional question, agreed with the Court of Claims that there was no taking. This decision was not cited in the *Lynah* case as to the remedy under the Tucker Act.

United States v. *Great Falls Mfg. Co.*, 112 U. S. 645, held that a suit could be maintained under the original Court of Claims Act (Act of February 24, 1855, c. 122, 10 Stat. 612) to recover compensation for property taken for a project authorized by Congress.

Wesley, 167 U. S. 204; *United States* v. *Lee*, 106 U. S. 196.[12] Often a landowner could thwart the construction of a lawful federal project by a suit in ejectment as effectively as by an equity injunction.

Great Falls Mfg. Co. v. *Attorney General*, 124 U. S. 581, one of the cases relied on in *Hurley* v. *Kincaid*, presented the same question which is here involved, and while the question was not squarely decided by the Court, what was said with respect to it supports our argument. In that case the plaintiff brought suit in the Circuit Court for Maryland against various officials and two contractors who were carrying out certain work for the United States to enjoin them from any further possession of or interference with the plaintiff's land or water rights. The plaintiff asked in the alternative that if it were found that the Government had legally taken the property by eminent domain an issue be framed and tried to determine the compensation due. The plaintiff had previously filed suit in the Court of Claims and the Court held that it had thereby agreed to submit its claim to the determination of that tribunal and become estopped to challenge the adequacy of the remedy in the Court of Claims. The final paragraph of the opinion states, however, that the Court is of the opinion that the remedy in the Court of Claims is adequate and that the bill must therefore be dismissed. The decision is not placed upon lack of equity jurisdiction.

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[12] It has been held that ejectment cannot be brought by a landowner who has a statutory action to recover just compensation. *Cairo and Fulton R. R. Co.* v. *Turner*, 31 Ark. 494; *Doty* v. *American Tel. & Tel. Co.*, 123 Tenn. 329.

3. *Decisions of this Court on use of patents by federal agents.*—The cases dealing with the use of patents by federal agents without express contract with the patentee are not distinguishable in principle from those involving the taking or destruction of land by federal agents, although the later patent cases are governed by other statutes than the Tucker Act. These cases recognize, in general, that when the agent is acting within his authority, and a remedy has been provided against the United States, so that the agent's authorization is constitutional, the patentee's only remedy is against the United States.

James v. *Campbell,* 104 U. S. 356, was a suit by the assignee of a patentee against a federal postmaster. The plaintiff sought to enjoin the use of a patented implement by the defendant (104 U. S. at 357); the claim is treated in the opinion, however, as one for compensation for the use of the invention. The Court said (104 U. S. at 358–359):

> But the mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute. The most proper forum for such a claim is the Court of Claims, if that court has the requisite jurisdiction.
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> The course adopted in the present case, of instituting an action against a public officer, who acts only for and in behalf of the government, is open to serious objections. We doubt very much whether such an action can be sustained. It is substantially a suit against the United States

> itself, which cannot be maintained under the guise of a suit against its officers and agents except in the manner provided by law. * * *

The Court reserved judgment on this question, however, as unnecessary to the decision, since it had concluded that the patent, if valid, was not infringed. See, also, *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59, 67–68.

In *United States* v. *Palmer*, 128 U. S. 262, the Court held that a patentee could maintain a suit against the United States under the Tucker Act to recover royalties from the United States for its use of the patentee's invention, where the use was found under an implied license from the patentee. In *Schillinger* v. *United States*, 155 U. S. 163, the Court held, however, that a patentee could not recover damages from the United States for the use of a patent, when the patentee had not consented to but had protested the use of the patent, because the contractual element essential to jurisdiction under the Tucker Act was lacking.[18]

In *Belknap* v. *Schild*, 161 U. S. 10, the patentee sued officers and employees of the United States for patent infringement, seeking an accounting, damages, an injunction, and destruction of the device alleged to infringe. The Court, citing the *Schillinger* case, stated that the United States could not be sued for infringement (use without the permission, express or implied, of the

[18] Two justices dissented, upon the grounds that a contract could be implied from the constitutional requirement that property shall not be taken without just compensation, and that the Court of Claims had jurisdiction in any event to entertain the suit as one founded upon the Constitution. 155 U. S. 172–180.

patentee), but that officers or agents of the United States were personally liable to an action of tort by a private person whose rights they had wrongfully invaded, even by authority of the United States, and that the officers or agents were therefore personally liable to be sued for infringement (161 U. S., at 17–18). The Court then held that the injunctive relief and destruction of the device sought could not be granted because title to and possession of the device were in the United States and the suit was therefore in that aspect one against the United States (161 U. S. 18–25); that the plaintiff was not entitled to recover profits because the defendants had not derived personal profits from the use of the invention (pp. 25–26); and that the plaintiff could not recover damages because none, in addition to the profits, had been shown and because the proper remedy to recover damages was by action at law (p. 26).

The beleaguered inventors were at last succored by Congress: by the Act of June 25, 1910, c. 423, 36 Stat. 851, it provided that the United States might be sued for patent infringement in the Court of Claims.

Crozier v. *Krupp*, 224 U. S. 290, a leading case on eminent domain, arose under that statute. It was brought to enjoin alleged infringement by an army officer. The Court held that the action was not maintainable because of the 1910 Act. It said (224 U. S. at 305) that the Act in effect provided that if patent rights were appropriated by an officer of the United States, "the United States shall be considered as having ratified the act of the officer and be treated as responsible pe-

cuniarily for the consequences." It added (224 U. S. at 305):

> The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided. In substance, therefore, in this case, in view of the public nature of the subjects with which the patents in question are concerned and the undoubted authority of the United States as to such subjects to exert the power of eminent domain, the statute, looking at the substance of things, provides for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides.

And the Court held that the remedy provided by the 1910 Act was an "adequate provision for the exercise of the power of eminent domain" (224 U. S. at 307). Accordingly, the Court directed that the bill be dismissed without prejudice to the right of the plaintiff to proceed in the Court of Claims under the 1910 Act.

This case, both in holding and reasoning, strongly supports the result here contended for. It holds that the creation of a remedy against the United States bars suit against its agent for acts for which the United States has assumed liability, for the reason, among others, that the Government's assumption of liability makes the officer's acts its acts.

Cramp & Sons v. *Curtis Turbine Co.*, 246 U. S. 28, is the converse of *Crozier* v. *Krupp*. There the patentee sued a government contractor to recover damages and

profits accruing from the infringement of certain patents in the construction of destroyers for the Government. The Court held that the 1910 Act did not entitle "all who contracted with the United States" to appropriate inventions without compensation upon the assumption that the United States would be liable, and that a contractor was bound to discharge his contract without violating the rights of others. Accordingly, for want of authorization by the United States, it held that the contractor was personally liable for infringement. See also *Marconi Wireless Co.* v. *Simon*, 246 U. S. 46, 56–57.[14]

4. *State court decisions.*—The precise question here presented has arisen in many states and, so far as we have found, the state courts have without exception adhered to the view that a contractor or official who performs work for a state, county, city, or other political

[14] Following and as a result of these decisions the Act of 1910 was amended, by the Act of June 18, 1918, c. 114, 40 Stat. 704, 705, to read as follows:

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: * * *"

In *Richmond Co.* v. *United States*, 275 U. S. 331, 343, this Court said, with reference to this amendment:

"The purpose of the amendment was to relieve the contractor entirely from liability of every kind for the infringement of patents in manufacturing anything for the Government and to limit the owner of the patent and his assigns and all claiming through or under him to suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. * * *"

subdivision, in accordance with its plans and specifications and who takes or damages private property in so doing, is not liable unless he has been negligent or unskillful in performing the contract. Sovereignties and municipal corporations must act through agents, and so long as the work is that of the government, those who execute the plans are not individually responsible.

Evans v. *Massman Construction Co.*, 343 Mo. 632, is of particular interest here since it arises, like the present case, out of a federal project for the stabilization of the Missouri River. In that case, too, the contractor was sued by an injured landowner. Both the Court of Appeals and the Supreme Court of Missouri held that the contractor was not accountable for the results of construction in compliance with his contract with the Government. The Court of Appeals said (115 S. W. (2d) 163, 167–168):

> Where the very act of improvement of navigation *necessarily* results in damages to riparian owners, they may not recover from the government, except the damage is so great as to amount to confiscation or appropriation of the property. In that event the government is liable to pay the fair value thereof, because the Constitution itself makes it liable. *United States* v. *Lynah*, 188 U. S. 445, 472. * * * In such case the government, and it only, is liable; for the taking was for and by the government, and the agent is not liable. *United States* v. *Lynch*, 188 U. S. 445.

Numerous other state cases are to the same effect. In *Burt* v. *Henderson*, 152 Ark. 547, 550, the court held that a contractor was "* * * exempt from liability

on account of damages growing out of the appropriation of lands for public purposes, except for injury resulting to the landowner on account of negligent or unskillful work." Accord: *Newport Levee Dist.* v. *Price*, 148 Ark. 122, 127–128;[15] *Mitchell* v. *Hahn*, 131 Ark. 286; *De Baker* v. *Southern California Ry. Co.*, 106 Cal. 257, 284–285[16]; *Marin Municipal Water Dist.* v. *Peninsula Paving Co.*, 94 P. (2d) 404 (Ct. App. Cal.); *Newton Auto Salvage Co.* v. *Herrick*, 203 Iowa 424; *Hunt-Forbes Const. Co.* v. *Robinson*, 227 Ky. 138; *Connell* v. *Yazoo & M. V. R. Co.*, 141 La. 701; *Keene* v. *Chapman*, 25 Maine 126; *Moraski* v. *T. A. Gillespie Co.*, 239 Mass. 44; *Nelson* v. *McKenzie-Hague Company*, 192 Minn. 180; *Brown* v. *Beatty*, 34 Miss. 227, 243–244; *Calking* v. *Baldwin*, 4 Wend. (N. Y.) 667; *Shaver* v. *Eldred*, 114 N. Y. 236; *Kendall* v. *Post*, 8 Ore. 141;

[15] In this case, the court held that the levee district could not escape liability for a taking on the ground that the taking had been done by a contractor who had by the contract assumed liability therefor. Accord: *Lesher* v. *The Wabash Navigation Co.*, 14 Ill. 85.

[16] In the *De Baker* case the court said (106 Cal. at 284–285): "Conceding, for the sake of the argument, that the effect of the constitutional provision is to make the state, or a public agency by it employed in the construction of a work designed to protect the lives and property of a large community, liable for indirect and consequential damages, such as were alleged and proved in this case * * * it does not follow that the contractor, executing the work carefully and properly according to the plan, would be liable. On the contrary, since in the case supposed the state or corporation would be liable, not for a tort, but only upon its obligation to compensate the damages resulting from the rightful exercise of its power, the liability would rest upon it alone, and the contractor, who has merely constructed the work carefully and properly according to the plan, will be exempt from any liability."

Panhandle Const. Co. v. *Shireman*, 80 S. W. (2d) 461 (Tex. Civ. App.); *Blair* v. *Waldo*, 245 S. W. 986 (Tex. Civ. App.), *Smith* v. *Gould*, 59 Wisc. 631; *Herring* v. *Gulick*, 5 Hawaii 57. Compare *Sutton* v. *Clarke*, 6 Taunt. 28, 44 (Common Pleas). Some of these decisions go on one or both of the two lines of reasoning next to be discussed; others merely state the rule without discussion.

5. *It is clear on principle that petitioners' only remedy is against the United States.*—It has been shown that the federal precedents are reasonably clear that petitioners' only remedy is against the United States under the Tucker Act, and that the state decisions are likewise to that effect. It is plain, moreover, from analysis of the principles involved that petitioners cannot hold respondent but must look to the United States.

The decisions of this Court and of the various state courts suggest two possible approaches to the question whether, when Congress has provided a remedy against the Government for a taking by eminent domain, suit can be brought against an agent or official acting for the Government. The first is to deal with the question as whether the suit is against the United States or can be viewed as against the officer in his individual capacity. The other approach is to view the question as one of Congressional intent, that is as whether Congress intended that the remedy against the Government be exclusive. Analysis according to either approach shows quite plainly that the suit cannot be maintained against the respondent here.

(a) *The Suit is One Against the United States.*—When the Government provides a remedy against itself

it legalizes the action of its agent (*Crozier* v. *Krupp*, 224 U. S. 290, 305), and it thereby eliminates any theoretical basis for a contention that the suit is against the agent in his individual capacity.

The theory upon which suits have been held to be maintainable against persons acting for the Government is simple. The agent is sued as a private individual. He defends by asserting that he is acting for the Government. The plaintiff then challenges this defense, either by claiming that the officer is acting beyond the scope of the authority conferred by the Government or that the authority attempted to be conferred is invalid, that is, unconstitutional, or both. That is the reasoning upon which it was held that the action could be maintained against the agent in *Scranton* v. *Wheeler*, 179 U. S. 141, 152–153. There, as we have seen, the Court took it for granted that the agent's authority was unconstitutional if there had in fact been a taking, and hence held that that question could and must be determined in that suit. See 179 U. S. at 152, 153, 165.

When, however, the United States has provided a remedy against itself if there has been a taking, the taking is constitutional, and the action of its agent is lawful whether or not it results in a taking. *Crozier* v. *Krupp*, *supra*; *Hurley* v. *Kincaid*, 285 U. S. 95, 104. The attack upon the agent's justification—that is, the plaintiff's attempt to show that the defendant has no valid authority from the Government—thus collapses. The defendant's authority is valid whether or not there

is a taking. Hence, any contention that the suit is one against the agent in his individual capacity falls. The suit is seen to be one against the United States, and the question is whether Congress has consented to it. Here it has not.[17]

Precisely this view is taken in 2 Nichols, *Eminent Domain* (2d ed.), Sec. 468, pp. 1232–1242. It is there stated that a statutory remedy for the recovery of just compensation for a taking is exclusive, and that the owner cannot enforce the payment of compensation in any other form of action, because the existence of the statutory remedy eliminates any basis for a common law action.[18] In accord with this view see *Perry* v. *City of Worcester*, 6 Gray (72 Mass.) 544, 546–547 (Shaw, C. J.); *Keene* v. *Chapman*, 25 Maine 126 128; *Fuller* v. *Edings*, 11 Rich. (S. C.) 239, 247; *Brown* v. *Beatty*, 34 Miss. 227, 243–244. Compare *Hunt-Forbes Construction Co.* v. *Robinson*, 227 Ky. 138, 140.

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[17] The line of reasoning is strongly suggested in the quotation from *United States* v. *Lynah*, 188 U. S. 445, 465–466, set out *supra*, p. 22, to the effect that the action resulting in the overflow, whether or not it resulted in an appropriation, was not to be regarded as the personal act of the officers, but as the act of the Government, since it was authorized by the Government. So, likewise is the statement quoted *supra*, p. 30, from *Crozier* v. *Krupp*, 224 U. S. 290, 305.

[18] The author summarizes (pp. 1237–1238):

"In short, in states in which payment in advance of the taking or injury complained of is not required by the constitution, although the existence of an adequate remedy is essential to the constitutionality of the taking, the creation of such a remedy, by making lawful what would otherwise be unlawful, necessarily excludes the common-law remedies, which are all predicated upon a breach of obligation."

This Court has, of course, often held that particular suits brought against officers or agents of the Government could not be maintained because they were in reality suits against the United States, even upon the assumption that the actions of the officers or agents complained of were without valid authorization. In *Wheeler* v. *Scranton*, 179 U. S. 141, 152, the Court held that the suit was not barred as in reality one against the United States if the authority claimed by the agent was invalid. It may be assumed that the decision would be controlling here if the validity of respondent's authority were sought to be tested. But it is not. And neither authority nor principle suggests that a suit against an agent for acts lawfully authorized by the Government can be considered a suit against the agent in his individual capacity, and not a suit against the Government.

(b) *The remedy under the Tucker Act is intended to be exclusive.*—It cannot be doubted that Congress had power, if it so desired, to make the remedy against the United States under the Tucker Act exclusive and to eliminate any remedy against the agents of the United States. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. It seems clear that it should be held to have done so here.

It is a general principle of condemnation law, recognized in *Kaukauna Co.* v. *Green Bay, etc., Canal*, 142 U. S. 254, 280, that a statutory remedy for obtaining compensation for an eminent domain taking is exclusive. While this principle is most commonly invoked to bar a nonstatutory remedy against a government (see 2

Nichols, *Eminent Domain* (2d ed.) Sec. 468, pp. 1232–1242), it is equally applicable to bar also any common law remedy against an agent or officer of the government. See *Smith* v. *Gould*, 59 Wisc. 631, 644–645; *Herring* v. *Gulick*, 5 Hawaii 57, 58; *Brown* v. *Beatty*, 34 Miss. 227, 243–244; *Calking* v. *Baldwin*, 4 Wend. (N. Y.) 667, 671–672; *Moraski* v. *T. A. Gillespie Co.*, 239 Mass. 44, 46. And this line of reasoning is strongly suggested in several of the decisions of this Court dealing with an eminent domain taking by an agent of the Government, or some action of an agent closely resembling such a taking. *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581; *James* v. *Campbell*, 104 U. S. 356, 358, 359; *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59, 67–68; *Crozier* v. *Krupp*, 224 U. S. 290, 305–307.

Another case illustrating this approach is *Wells* v. *Roper*, 246 U. S. 335. That was a suit to enjoin the First Assistant Postmaster General from annulling a contract with the plaintiff. The Court held that the suit was essentially against the United States and said (p. 338):

> The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise.

See also *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

In cases such as the present it is clearly in the interest of the United States that the remedy against it be exclusive (see *supra*, pp. 8–9).

The inconvenience to plaintiffs of having to sue the United States instead of its agents would not be very great. Petitioners here could have sued the United States in the same court in which they sued respondent, while plaintiffs seeking recovery in excess of $10,000 could sue in the Court of Claims.

II

THERE HAS BEEN NO TAKING OF PETITIONERS' LAND WITHIN THE MEANING OF THE FIFTH AMENDMENT

It is undisputed, and is clear from the precedents, that petitioners cannot recover in this action unless their property has been taken within the meaning of the Fifth Amendment, and we have attempted to show that whether petitioners' property has been taken cannot be litigated in this action against respondent, since respondent's acts were lawfully authorized by the United States whether or not they amounted to or resulted in a taking. If, however, we are mistaken in this contention, we submit that there has been no taking here in the constitutional sense.

In numerous cases this Court has considered the contention that the Government by exercising control over water through navigation and flood-control works has taken land. In these cases, and other cases involving alleged takings, the Court has announced many different criteria, some of them mutually exclusive, for determining whether there has been a taking. The Court has sometimes stated that an intention by the Government to impose a servitude is essential to a taking (*Peabody* v. *United States*, 231 U. S. 530, 538–539;

Portsmouth Co. v. *United States*, 260 U. S. 327, 329); and it has suggested that if the Government had no purpose or design to damage or destroy the property that is a factor operating against there being a taking (*Scranton* v. *Wheeler*, 179 U. S. 141, 164; *Hughes* v. *United States*, 230 U. S. 24, 34). In other cases, however, the Court has said that there is a taking if there has been an actual and permanent invasion of the land and destruction of its value (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177–178, 181; *Sanguinetti* v. *United States*, 264 U. S. 146, 149; *Bedford* v. *United States*, 192 U. S. 217, 225); or if the necessary result of the Government's action is a flooding of the land by backwater (*United States* v. *Lynah*, 188 U. S. 445, 468–469; *United States* v. *Cress*, 243 U. S. 316, 328). The Court has said that where, if the case were one against a private individual his liability, if any, would be in tort, there is no taking. See *Sanguinetti* v. *United States*, 264 U. S. 146, 150; *Peabody* v. *United States*, 231 U. S. 530, 539; *Tempel* v. *United States*, 248 U. S. 121, 129. It has, on the other hand, stated that "a destruction for public purposes may as well be a taking as would be an appropriation for the same end." *United States* v. *Welch*, 217 U. S. 333, 339; see *Manigault* v. *Springs*, 199 U. S. 473, 484–485. Compare *United States* v. *Grizzard*, 219 U. S. 180. The Court has held that partial impairment of value may be a partial taking (*United States* v. *Cress*, 243 U. S. 316, 328–329; see *Jacobs* v. *United States*, 290 U. S. 13, 16), but has tended to hold that there was no taking where the impairment of value was only partial (*Danforth* v. *United States*, No. 309, this Term, decided December 4, 1939;

Sanguinetti v. *United States*, 264 U. S. 146), at least once on the ground that added expense of protection is not a taking. *Manigault* v. *Springs*, 199 U. S. 473, 473–474; and see *United States* v. *Lynah*, 188 U. S. 445, 474; *Saliotte* v. *King Bridge Co.*, 122 Fed. 378, 384 (C. C. A. 6th), certiorari denied, 191 U. S. 569.

Despite this diversity of theory, the results of the decisions are wholly consistent when viewed from the standpoint of the nature of the Government's project. So viewed, the cases uniformly hold that land permanently subjected to overflow, either continuous or intermittent, by backwater from dams is taken within the meaning of the Fifth Amendment, but that land damaged or destroyed by reason of alteration of the natural direction, velocity, or volume of a stream by dikes or levees is not so taken. This distinction according to the nature of the construction work, while perhaps not a universal solvent, is the only discernible reconciliation of the decisions of this Court. And we think that it is expressive of important reasons of policy and justice.

1. *The dyke and levee cases.*—This Court has several times squarely held that destruction of or damage to property ensuing by reason of alteration of the natural direction, velocity, or volume of a stream by works constructed by the United States for the improvement of navigation does not constitute a taking. *Bedford* v. *United States*, 192 U. S. 217, and *United States* v. *Archer*, 241 U. S. 119, were decided upon facts especially analogous to those in the present case.

In the *Bedford* case the Mississippi River, by avulsive erosion, had cut through a neck of land. The

United States, in order to stabilize the new channel and prevent further shifting and widening out of the channel which would otherwise have occurred, placed revetments upon the banks of the new channel. These revetments, by confining the river to a narrow channel and fixing it there, held the current of the river against the plaintiff's land, which was washed away. The Court held that there has been no taking, notwithstanding the argument of the plaintiff that works of the Government which resist or disturb the operation of natural forces in a river and thereby injure riparian owners constitute a taking of private property for public use within the meaning of the Fifth Amendment. In reply to this argument the Court said (192 U. S. at 224):

> And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility.

In *United States* v. *Archer*, 241 U. S. 119, the plaintiff owned a plantation in a bend of the Mississippi River. To prevent the river from breaking through the neck of the bend, which would have threatened the levee system in the vicinity and would have shifted the channel of the river away from a river port, the United States, in collaboration with local authorities, constructed a protecting dyke. The dyke was located on the plaintiff's land, and it deflected the current of the river, during periods of high water, across the plaintiff's plantation, washing away the top soil and rendering the land unfit

for cultivation. The plaintiff brought suit to recover compensation for the land occupied by the dyke and for the much larger tract of land ruined by the deflection of water upon it by the dyke. The Government admitted liability for the land occupied by the dyke, but denied liability for the other land destroyed.

It was agreed by the Court of Claims (47 C. Cls. 248) and by this Court (241 U. S. at 127–129), including the dissenting justice (241 U. S. at 144–145), that if the United States had not taken part of the plaintiff's land for the dyke there could, under the *Bedford* case, be no recovery for the other land destroyed by waters deflected by the dyke, and that the plaintiff's right to recover depended upon whether the construction of the dyke upon his land brought the case within the doctrine of *United States* v. *Grizzard*, 219 U. S. 180, 183, in which it was held that when there is an actual taking of part of a tract of land the owner can recover not only for the parcel actually taken but also for damages to his remaining land "by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land." The Court of Claims held that the case was within the *Grizzard* case, and entered a large judgment for the plaintiff.

This Court found it unnecessary to determine whether the *Bedford* or the *Grizzard* case was controlling because it held that the findings of the Court of Claims did not sufficiently reveal whether the destruction of the land was chargeable to the United States rather than to the local authorities, or whether the destruction was attributable to the dyke or would have occurred even if

the dyke had not been constructed. The Court said (241 U. S. at 130):

> it is found that but for the dike the river would have cut through the neck of land. Or, to express it another way, the dike kept the river in its channel. But, as we have seen, many forces were at work, and if the conditions at claimants' plantation were artificial they were the result of the lawful exercise of power over navigable rivers.

Farther on the Court pointed out (241 U. S. at 131–132) that if the Government had permitted the river to break through the neck it might eventually have washed the plaintiff's plantation away anyway. Accordingly, the case was remanded to the Court of Claims for more particular findings.

On retrial, the Court of Claims entered a small judgment including some allowance for damage to land other than that occupied by the dyke. 53 C. Cls. 405, 417. On cross appeals the judgment was affirmed by an equally divided Court. 251 U. S. 548.

In *South Carolina* v. *Georgia,* 93 U. S. 4, the Court held that the United States had power to shift and control the navigable channel of a river, even to the extent of blocking off one navigable channel in favor of another. In *Gibson* v. *United States,* 166 U. S. 269, strongly relied upon in the *Bedford* case, a dyke constructed by the United States for the purpose of concentrating the flow of a river in its main channel interfered with access to the plaintiff's farm, greatly reducing its value. Denying recovery, this Court said (p. 276):

> Moreover, riparian ownership is subject to the obligation to suffer the consequences of the im-

provement of navigation in the exercise of the dominant right of the Government in that regard.

To the same effect, see *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Scranton* v. *Wheeler*, 179 U. S. 141. The power of the United States extends to the appropriation of the full flow of water of a navigable stream for the improvement of navigation, without giving rise to a taking. *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 425–427; *United States* v. *Chandler-Dunbar Co.*, *supra*.

Likewise closely analogous to the present case are the levee construction cases, *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; and *Cubbins* v. *Mississippi River Comm'n*, 241 U. S. 351.[19] These cases constitute striking recognition of the principle that land damaged or destroyed by federal navigaton works is not taken within the Fifth Amendment. In the *Jackson* case the United States, in cooperation with local interests, built or maintained a system of continuous levees along both banks of the Mississippi except in stretches where natural ridges approached close to the river and served the purpose of levees. The theory was to use the power of the river to cut out a deeper channel, by more narrowly confining its waters. Necessarily it involved raising the level of the river. The plaintiffs owned plantations in a small basin between the river and a natural ridge. They had constructed levees to protect their lands, and their plantations were highly improved and of great value. The

[19] Cf. also *Matthews, Trustee* v. *United States*, 87 C. Cls. 662.

federal plan did not include the protection of the plaintiff's lands, because it was not thought economically feasible. As a result of levee construction by the United States and local interests, and of the closing by the United States of a natural outlet of the Mississippi below the plaintiff's lands, the level of the river was raised, the plaintiff's levees were washed away, and their lands were subjected to repeated flooding which destroyed their value. The Court held that upon these facts the United States had not taken the plaintiff's lands. It said (230 U. S. at 20):

> it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible.

and (230 U. S. at 23):

> the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open.

In *Hughes* v. *United States*, 230 U. S. 24, in addition to the factors which had unsuccessfully been contended to amount to a taking in the *Jackson* case, the United States had constructed a new levee which, instead of running in front of the plaintiff's property as the old levee had done, ran behind it. The lower court allowed recovery upon the ground that the acts of the United States had, in effect, moved the plaintiff's property into the bed of the river, but this Court held the *Jackson* case to be controlling. In *Cubbins* v. *Mississippi River Comm'n*, 241 U. S. 351, the allegations were substan-

tially the same as the facts in the *Jackson* case, except that it was alleged that the flooding resulted more rapidly—within one year. Again, the Court held that there had been no taking. And in *United States* v. *Sponenbarger*, No. 72, this Term, decided December 4, 1939, this Court, citing the *Jackson* case, said:

> This Court has previously decided that "the construction of levees on the opposite" bank of the Mississippi River which resulted in permanently flooding property across the river did not amount to a "taking" of the flooded area within the Fifth Amendment. * * *

Compare also *Danforth* v. *United States*, No. 309, this Term, decided December 4, 1939.

The holding of the court below that the facts alleged in the present case do not show a taking finds further support in decisions of lower federal courts and state courts. On facts substantially identical with those here involved the Circuit Court of Appeals for the Sixth Circuit held that there was no taking. *Franklin* v. *United States*, 101 F. 2d 459, affirmed by this Court on another ground, No. 27, this Term, decided November 13, 1939; see also, *Salliotte* v. *King Bridge Co.*, 122 Fed. 378 (C. C. A. 6th), certiorari denied, 191 U. S. 569.

While state court decisions often turn upon provisions of state constitutions different from those of the federal Constitution,[20] and are far from consistent

[20] The rule that the constitutional prohibition against "taking" without compensation does not extend to consequential damages is so well established as to have resulted in many state constitutional provisions to the effect that property may not be taken *or damaged* without compensation. See *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 554.

even in individual jurisdictions, there is a substantial body of state court authority in accord with the position here taken by the Government. *Hollister* v. *The Union Co.*, 9 Conn. 436; *Green* v. *Swift*, 47 Cal. 536; *Green* v. *State*, 73 Cal. 29; *Lamb* v. *Reclamation District No. 108*, 73 Cal. 125; *Gray* v. *Reclamation District No. 1500*, 174 Cal. 622; *Bass* v. *State*, 34 La. Ann. 494; *Brooks* v. *Cedar Brook &c. Imp. Co.*, 82 Me. 17; *Durham* v. *Fibre Co.*, 100 Me. 238; *Henry* v. *Vermont Central Railroad*, 30 Vt. 638.

2. *The dam cases.*—Petitioners rely upon the cases holding that lands permanently subjected to increased overflow, either intermittent or permanent, by backwater from dams are taken within the Fifth Amendment. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445 *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Cress*, 243 U. S. 316.[21]

On its facts the present case is like the cases dealing with damage caused by dykes (*United States* v. *Archer*, 241 U. S. 119; *Gibson* v. *United States*, 166 U. S. 269; *South Carolina* v. *Georgia*, 93 U. S. 4), revetments (*Bedford* v. *United States*, 192 U. S. 217), and levees (*Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Comm'n*, 241 U. S. 351), rather than the cases

[21] In *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642, the *Pumpelly* case was described as the "extremest qualification" of the doctrine that acts done in the proper exercise of governmental powers, and encroaching upon private property only consequentially, do not give to the owner of such property a right of action for compensation. See *United States* v. *Sponenbarger*, No. 72, this Term (pamph. 5).

dealing with flooding by backwater from dams. And while the line between the two types of cases may sometimes be indistinct, we think that, generally speaking, the differentiation which the Court has made between the two types of cases is bottomed upon important considerations of policy and justice.

3. *Distinctions in policy between dam cases and dyke and levee cases.*—The land which will be flooded by backwater from a dam can only be land upstream from the dam no higher in elevation, or only slightly higher (depending upon the volume of the stream), than the dam outlet. The land for which compensation can be claimed for flooding by backwater from dams is hence definitely limited in amount and location. No difficulties of causality arise. The location and extent of such land can readily be ascertained in advance of construction, and compensation for land flooded is normally thought of as one of the costs of building a dam. Payment of compensation for such land thus imposes upon the Government no burden unusual in character or unlimited in extent.

The situation is vastly different as respects claims to compensation for damage to land by other navigation works, such as dykes, revetments, or levees. The land for which such claims are made may be situated almost anywhere in the valley below the works. In *Bedford* v. *United States, supra,* the land claimed to have been taken was six miles downstream from the revetment. In *Jackson* v. *United States, supra,* and *United States* v. *Sponenbarger, supra,* hundreds of miles separated the lands from some parts of the levee system which

damaged or were said to threaten them. There is virtually no limit as to the land for which compensation could be claimed under the doctrine here sought to be established. In the present case the dykes forced the current of the river away from its former course and against the Nebraska bank, where the petitioners' land lay. The river must inevitably swing back lower down to the Iowa side, and, save as restrained by other dykes and revetments, will doubtless erode land there. Must the Government then pay for that land? Still later it may be assumed that the river will swing away from the Iowa bank and back against the Nebraska bank, and so on downstream in the familiar sweeping bends. Plainly, the Government is not to be held liable for all downstream swings of the river which can be traced to its dyke and made to pay compensation for all land eroded by such swings. As was pointed out by the Court in the *Bedford* case (192 U. S. at 224), "Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility." See also *Horstmann Co.* v. *United States*, 257 U. S. 138, 146.

The full effects which will result from changing the course of moving waters are virtually impossible of ascertainment in advance and even after construction has been completed and damage has taken place it will ordinarily be difficult to determine whether there is causal connection between the two or whether the damage was occasioned by natural causes. See *Bedford* v.

United States 192 U. S. 217, 219; *Sanguinetti* v. *United States*, 264 U. S. 146, 149–150; *Horstmann Co.* v. *United States*, 257 U. S. 138, 146. Soil peculiarities, floods, accidental lodging of obstructions—all will modify or blur the result of the construction work. See *United States* v. *Archer*, 241 U. S. 119, 130.

In the case at bar it is clear that the Government's work was the immediate cause of the washing away of petitioners' land, and the jury verdict has settled that it was the proximate cause in the ordinary tort sense. But that does not dispose of the case. The Government's power to construct navigation works cannot effectively be exercised if it is subject to liability for injuries to land resulting therefrom—a liability which would also subject it to protracted litigation in many cases in which causation could not be shown. In none of the levee cases (*Jackson*, *Hughes*, and *Cubbins*) was there any question but that the damage and destruction complained of were directly attributable to the levee construction. See also *Horstmann Co.* v. *United States*, 257 U. S. 138, 145. Nor has the Court, in distinguishing the dam cases from the other navigation works cases, placed its denial of liability in the latter upon failure to establish causation; rather it has stated that the injury was "consequential," a term used to sum up the policy consideration forbidding liability which was made explicit in the *Bedford* case. See *Bedford* v. *United States*, 192 U. S. 217, 225; *United States* v. *Cress*, 243 U. S. 316, 327–328.

The landowner, on the other hand, will typically suffer no injustice from a denial of recovery in such cases.

In most of the levee and diversion cases it is probable that the damage would sooner or later have occurred without any Government work. In the *Archer* case the Court was unwilling to hold the Government liable for the reason, among others, that it was not satisfied but that the river would eventually have effected the damage complained of even if the Government had not constructed the dyke. See 241 U. S. at 131–132. See also *Bedford* v. *United States*, 192 U. S. 217, 219, 225. *Sanguinetti* v. *United States*, 264 U. S. 146, 149–150. Compare *Danforth* v. *United States*, No. 309, this Term, decided December 4, 1939. Lands situated along a shifting river are, in other words, subject to a "natural servitude" by reason of their location. *Franklin* v. *United States*, 101 F. (2d) 459, 464 (C. C. A. 6th), affirmed on another ground, No. 27 this Term, decided November 13, 1939; cf. *United States* v. *Sponenbarger*, *supra*.

4. *The present case.*—The doctrine that lands along a shifting river are subject to a natural servitude is peculiarly applicable to the valley of the Missouri River. This Court has heretofore noted that rapid changes in its course are characteristic of the Missouri River. See *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 625–626; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 189–190; *Nebraska* v. *Iowa*, 143 U. S. 359, 368–370. In the case last cited the Court describes in some detail the physical characteristics of the river. It states that the exceptional velocity of the current and the volume of water at the time of the annual rises "has great and rapid action upon the loose soil of its banks," and that this river is distinguished from other streams "in the

rapidity of the change caused by the velocity of the current." And it refers to "the washing from the one side and on to the other" and to the varying boundary between Iowa and Nebraska (143 U. S. at 368–370).

House Document No. 1120, 60th Congress, 2d Session, and House Document 238, 73d Congress, 2d Session, describe the general physical features of the Missouri River and Valley, and the constant bank erosion and changes of course.[22] The Missouri River, throughout its lower course, the portion with which we are here concerned, flows through a relatively narrow valley between high bluffs. The distance between bluffs varies from a maximum of 17 miles at Sioux City, Iowa, to a minimum of 2 miles at Kansas City and elsewhere downstream from there. H. Doc. 1120, pp. 11, 29. The entire area between the bluffs is subject to erosion by the river. H. Doc. 1120, p. 29. The river is remarkable for the general instability of its banks. H. Doc. 1120, pp. 12, 19; H. Doc. 238, pp. 1, 22, 272, 566. It has meandered extensively in only recent years. H. Doc. 1120, p. 29. One purpose of the project to stabilize the course of the river is to protect the bottom land from such meanderings. H. Doc. 1120, pp. 9, 29, 30; H. Doc. 238, pp. 8, 39, 272, 569.

The precise nature of the work being done in this project, as well as the character of the river, is vividly

[22] The Act of January 21, 1927, c. 47, 44 Stat. 1010, 1013, the initial authority for the project of which the dykes constructed by petitioner are a part, authorized the work in accordance with the report of the Board of Engineers for Rivers and Harbors submitted in House Document 1120, 60th Congress, 2d Sess. The Act of August 30, 1935, c. 831, 49 Stat. 1028, 1034, authorized prosecution of the same project, describing it as the project recommended in House Document 238, 73d Congress.

portrayed in the pamphlet entitled "Improvement of the Missouri River by the Corps of Engineers, U. S. Army," copies of which have been filed with the Court. It is pointed out, p. 3, that the river has at one time or another occupied all of the valley between the bluffs. The diagrams, pp. 4–5, are particularly helpful in obtaining a clear picture of the methods and objects of the project. With these diagrams may be compared Defendant's Exhibits 23 and 7 (R. 107, 113) in the present case. All show the general scheme to narrow the channel of the river, fixing it in gentle curves, retaining the general course of the river, so far as practicable from the engineering standpoint, in the location it had just before the work was begun. See also pp. 7, 8–9 of the pamphlet.

This, then, is the general picture. It is supplemented for this case by maps, blueprints, and testimony showing the location of the river with respect to the Yearsley land at various times over nearly a hundred years. The Yearsleys and Stephenson bought their land in 1928, at a referee's sale (R. 41). Before that the Yearsleys' father had owned it; he bought it in 1912 (R. 41). Comparison of Plaintiff's Exhibit 1 (R. 47) with Defendant's Exhibit 2 (R. 57), both prepared by the county surveyor, and examination of his explanations thereof (R. 49, 56), show that all of the land which has been washed away had all been built up by accretion since 1923. Defendant's Exhibit 5 (R. 65) shows that part of the 1923 Yearsley land had been built up since 1917, and that by 1928 a great deal more had been built up. In 1912 all of the "accreted" land was in the river and part of the "deeded" land (R. 67).

Defendant's Exhibits 7 (R. 113), 12 (R. 93), and 23 (R. 107) add other chapters to the story of the Yearsley land and show the construction work, including the dykes, 601.9, 601.9A, 602.7, and 602.7A, built by respondent as part of the Government project in this area. In 1842–1858 the river ran directly across what is now the Yearsley deeded land. But by 1890 the thalweg survey shows the main channel far to the east of all the Yearsley land, whether deeded or accreted, and as far to the east as it has ever been recorded.

Petitioners thus claim that they are entitled under the Constitution to be compensated for the washing away by the river of land which it had built up between 1925 and 1934, when respondent's operations commenced. The project of which respondent's operations were a part was authorized in 1927, and had been projected since at least as early as 1908. While the precise location of the dykes doubtless was not determined so early, the project was from its birth one to stabilize the channel, and if the Government had operated on the river at a moment when it flowed across the lands now claimed to have been taken there could be no claim for compensation. We submit that the Constitution does not require that the Government in order to escape liability wait, idle but vigilant, until it can apprehend the river in the exact spot in which it desires to anchor it.

That petitioners will benefit from the federal project is, moreover, clear. As shown on Exhibits 7 (R. 113), 12 (R. 93), and 23 (R. 107), the Government will, as part of its project, construct a revetment protecting the Yearsley land from any further advance of the

river.[23] In view of the nature and history of the river in this section, and of the history of the Yearsley tract in particular, it can hardly be doubted that the benefits of permanent protection to the balance of the Yearsley tract will at least equal the loss of the much less valuable land washed away.[24] In such circumstances there is no taking for which the Constitution requires compensation. Compare *United States* v. *Sponenbarger*, No. 72, this Term, decided December 4, 1939.

CONCLUSION

It is submitted that this suit cannot be maintained against respondent and that petitioners' remedy, if any, is a suit against the United States under the Tucker Act. If, however, this suit is properly brought, it is submitted that petitioners' land has not been taken within the meaning of the Fifth Amendment.

Respectfully submitted.

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Attorney, War Department.

DECEMBER 1939.

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[23] We are informally advised by the War Department that this revetment was completed in August and September, 1939.

[24] The evidence was in conflict whether this land was more nearly sand or soil, but petitioners' witnesses agreed that it was sandier than the "deeded" land and that it was covered in part by a slough (R. 50, 53).

U. S. GOVERNMENT PRINTING OFFICE 1939

PREME COURT OF THE UNITED STATES.

No. 156.—October Term, 1939.

awrence Yearsley and George Yearsley, Petitioners, *vs.* A. Ross Construction Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 29, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

n this action, brought in the state court of Nebraska and re-ved to the federal court, petitioners sought to recover damages on the ground that the respondent company had built dikes in Missouri River and, using large boats with paddles and pumps produce artificial erosion, had washed away a part of petitioners' d. Respondent alleged in defense that the work was done pur-nt to a contract with the United States Government, and under direction of the Secretary of War and the supervision of the ief of Engineers of the United States, for the purpose of im-ving the navigation of the Missouri River, as authorized by an t of Congress. Petitioners in reply alleged that the contract did contemplate the taking of their land without just compensation d that the acts of the contractor resulted in the destruction of itioners' property in violation of their rights under the Fifth endment of the Federal Constitution.

Petitioners had judgment which the Circuit Court of Appeals versed. 103 F. (2d) 589. Certiorari was granted because of ged conflict with applicable decisions of this Court. October 9, 39. The Government has been permitted to appear as *amicus iae*.

The Circuit Court of Appeals found that the evidence established hat two dikes built in the river above and one dike built opposite ir (petitioners') land had diverted the channel or the current of river from the Iowa shore to the Nebraska shore" and that as a ult the "accretion land" of petitioners "to the extent of perhaps acres had been eroded and carried away". There was evidence

tending to show that in extending the dike opposite petitioners' land, the contractor, "apparently to keep open an adequate channel for navigation between the end of the dike and the shore", had accelerated the erosion "by using the paddle wheels of its steamboats to increase the action of the current". But there was no evidence, as the Court of Appeals said, that this "paddle washing" had done "anything more than hasten the inevitable". The Court of Appeals also found it to be undisputed "that the work which the contractor had done in the river bed was authorized and directed by the Government of the United States for the purpose of improving the navigation of this navigable river". It is also conceded that the work thus authorized and directed by the governmental officers was performed pursuant to the Act of Congress of January 21, 1927, 44 Stat. 1010, 1013.

In that view, it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will. See *Murray's Lessee* v. *Hoboken Land and Improvement Company*, 18 How. 272, 283; *Lamar* v. *Browne*, 92 U. S. 187, 199; *The Paquete Habana*, 189 U. S. 453, 465. Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 619, 620. See *United States* v. *Lee*, 106 U. S. 196, 220, 221; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *Tindal* v. *Wesley*, 167 U. S. 204, 222; *Scranton* v. *Wheeler*, 179 U. S. 141, 152; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108, 110.

Petitioners present the question whether the building of the dikes and the erosion of their land, because of the consequent diversion of the current of the river, constituted a taking of their property for which compensation must be made. We do not find it necessary to pass upon that question, for if the authorized action in this instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded

emedy for its recovery by a suit in the Court of Claims. 28 S. C. 250. *United States* v. *Great Falls Manufacturing Co.*, 112 S. 645, 656, 657; *Great Falls Manufacturing Co.* v. *Attorney eral*, 124 U. S. 581, 600; *United States* v. *Lynah*, 188 U. S. 445, 466; *Tempel* v. *United States*, 248 U. S. 121, 129, 130; *Hurley* v. *caid*, 285 U. S. 95, 104, 105. "The Fifth Amendment does not tle him [the owner] to be paid in advance of the taking" and statute affords a plain and adequate remedy. *Hurley* v. *Kin- l, supra.* It follows that as the Government in such a case mises just compensation and provides a complete remedy, action ch constitutes the taking of property is within its constitutional er and there is no ground for holding its agent liable who is ply acting under the authority thus validly conferred. The on of the agent is "the act of the government". *United States Lynah, supra.*

This principle has been applied under the statute providing com- sation for the use by the Government of patented inventions hout license of the owner. Act of June 25, 1910, 36 Stat. 423. *Crozier* v. *Krupp*, 224 U. S. 290, 305, the Court said: "The ption by the United States of the wrongful act of an officer is ourse an adoption of the act when and as committed, and causes h act of the officer to be, in virtue of the statute, a rightful ap- priation by the Government, for which compensation is pro- ed". In view of later decisions limiting the scope of that stat- (*Cramp & Sons* v. *Curtis Turbine Co.*, 246 U. S. 28; *Marconi reless Telegraph Co.* v. *Simon*, 246 U. S. 46), Congress amended statute so as to insure complete compensation by the Govern- t and thus it operated to relieve the contractor from liability very kind "for the infringement of patents in manufacturing thing for the Government". The provision for the recovery the United States of "entire" compensation "emphasized the usive and comprehensive character of the remedy provided". *hmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 343. o, in the case of a taking by the Government of private prop- for public use such as petitioners allege here, it cannot be bted that the remedy to obtain compensation from the Govern- t is as comprehensive as the requirement of the Constitution, hence it excludes liability of the Government's representatives fully acting on its behalf in relation to the taking.

The Government contends that in this instance there has been no ng of petitioners' lands within the meaning of the Fifth Amend-

ment. The Circuit Court of Appeals took that view, holding that petitioners had sustained merely "consequential damages from the deflection of waters by reason of structures lawfully constructed in aid of navigation". Petitioners, as we have said, combat this ruling. We do not undertake to review it or the authorities cited by the parties and the Government in that relation, for petitioners' claim, resting upon the theory that there has been a "taking", has been found untenable, and there is no contention, or basis for one, that if the contractor was acting for the Government in prosecuting its work in aid of navigation without the taking of property, the contractor would be subject to the asserted liability.

The judgment of the Circuit Court of Appeals in reversing that of the District Court is affirmed but upon the grounds stated in this opinion.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.